BEFORE THE APPEALS BOARD FOR THE KANSAS DIVISION OF WORKERS COMPENSATION

RAUL GOMEZ)
Claimant)
VS.)
) Docket No. 220,768
NATIONAL BEEF PACKING CO., L.P.)
Respondent)
AND)
)
WAUSAU INSURANCE COMPANIES)
Insurance Carrier)

ORDER

Claimant requested review of the preliminary hearing Order dated November 17, 1997, entered by Administrative Law Judge Kenneth S. Johnson.

Issues

The Administrative Law Judge found that claimant had not provided respondent with timely notice of accident as required by K.S.A. 44-520. Timely notice of accident is the only issue before the Appeals Board on this review.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

The preliminary hearing Order should be affirmed.

Claimant testified he injured his hands, arms, and shoulders while working for the respondent between 1990 and his last day of work in January 1997. Claimant testified he advised his supervisors on various occasions that he was experiencing aches and pains in his shoulders and upper extremities. Claimant and respondent's workers compensation

coordinator, Lezlie Morris, testified at the preliminary hearing held before the Administrative Law Judge. The depositions of claimant's friend and former supervisor Anthony Varela, nurses' station clerk Michelle Plotner, registered nurse Teresa Clayton, and Lezlie Morris were also presented to the Administrative Law Judge as part of the preliminary hearing record.

The answer to the question whether claimant provided respondent with timely notice of accidental injury depends upon whether one believes claimant who testified he visited respondent's nurses' station up to six times per week and sometimes as often as two or three times per day with arm and shoulder complaints, or whether one believes the other witnesses who testified they did not recall or believe that claimant had advised them of his physical complaints. The records kept in the nursing station do not support claimant's allegations.

The Administrative Law Judge believed the other witnesses and found that claimant failed to provide timely notice as required by K.S.A. 44-520. Because the Administrative Law Judge had the opportunity to observe claimant testify, in this instance the Appeals Board gives some deference to the Judge's assessment of claimant's credibility. When considering the entire record, for preliminary hearing purposes, the Appeals Board also finds that claimant failed to provide respondent with timely notice of accidental injury.

As provided by K.S.A. 44-534a, as amended, preliminary hearing findings, including those of the Appeals Board, are not binding and subject to modification upon a full hearing on the claim.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order dated November 17, 1997, entered by Administrative Law Judge Kenneth S. Johnson should be, and hereby is, affirmed.

Dated this day of January 1998.
BOARD MEMBER

c: Stanley R. Ausemus, Emporia, KS
D. Shane Bangerter, Dodge City, KS
Kenneth S. Johnson, Administrative Law Judge
Philip S. Harness, Director

IT IS SO ORDERED.